

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVID SMITH AND MICHELLE SMITH, §
§
Plaintiffs, §
§
VS. § CIVIL ACTION H-13-2578
§
US BANK, NATIONAL ASSOCIATION, §
§
Defendant. §

OPINION AND ORDER

Pending before the Court in the above referenced cause to recover real property are Defendant US Bank, National Association's motion to dismiss (instrument #5) and United States Magistrate Judge's memorandum and recommendation that it be granted and that Plaintiffs' original petition be dismissed with prejudice (#17). Plaintiffs David Smith and Michelle Smith have not filed any objections to the memorandum and recommendation.

Standard of Review

Where no timely objections are filed to a magistrate judge's memorandum and recommendation ("M&R"), the district court reviews for plain error. The district court only has to review the memorandum and recommendation to determine whether it is clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989), cert denied, 492 U.S. 918 (1989). Failure to file timely objections bars the aggrieved party from attacking factual findings on appeal, and, absent plain error, from

attacking conclusions of law on appeal. *Proctor v. U.S.*, Civ. A. No. H-06-2110, 2007 WL 2471606, *3 (S.D. Tex. Aug. 29, 2007), citing *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Ware v. King*, 694 F.2d 89 (5th Cir. 1982), cert. denied, 461 U.S. 930 (1983); *Nettles v. Wainwright*, 677 F.2d 404, 408 (5th Cir. 1982)(*en banc*); and *Douglas v. United States Auto Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996), superceded by statute on other grounds, 28 U.S.C. § 636(b)(1)(extending the time to file objections from ten to fourteen days).

Court's Decision

Because the Court agrees with the Magistrate Judge that as a matter of law the four-year residual statute of limitations under Texas Civil Practice & Remedies Code § 16.051 bars Plaintiffs' claims that their home equity loan violated several provisions of the Texas Constitution Art. XVI, § 50(a)(6) under the Fifth Circuit's decision in *Priester v. J.P. Morgan Chase Bank, N.A.*, 708 F.3d 667, 674 (5th Cir.), cert. denied, 134 S.Ct. 196 (2013) and progeny. The Court also agrees with United States Magistrate Judge Stacy that Plaintiffs' breach of Deed of Trust is additionally by § 16.051's residual four-year statute of limitations. *Phelps v. U.S. Bank Nat. Ass'n*, Civ. A. No. 2:13-CV-361, 2014 WL 991803, at *4, the Court hereby

ADOPTS the Magistrate Judge's memorandum and recommendation as its own and

ORDERS that US Bank National Association's motion to dismiss is GRANTED and Plaintiffs' Original Petition is DISMISSED with prejudice. A final judgment will issue by separate document.

SIGNED at Houston, Texas, this 14th day of August, 2014.

Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE